Litigation as Lobbying
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By now, it is well documented that interest groups participate extensively in the judicial process, pursuing their policy goals through litigation as well as through more traditional legislative or electoral means. The literature on interest group litigation has grown in recent years as scholars have paid increased attention to what Bentley and Truman noted and groups have recognized for some time—that lobbying the judiciary is one of the many options available to organized interests. For the most part, the literature tends to look at sponsorship and amicus activity separately, and has struggled with defining group “success” in litigation. The foregoing account of *UAW v. Johnson Controls* has attempted to integrate the activity of litigating parties and amici together to more accurately reflect how cases are actually pursued, as these parties often work closely together. Even when there is not a great deal of direct coordination between parties, the efforts of the amici supporting one side in a case cannot be viewed without considering the role of the litigating party and the dynamics of the case at bar, for this context is what provides amici the opportunity to step forth and articulate their positions, whether they are doing it to assist the party or for their own gain.

Students of politics have long referred to the “countermajoritarian difficulty” presented by unelected, life-tenured judges in effect engaging in policy making when courts exercise their power of judicial review (Bickel 1962). But it is also increasingly true that courts routinely make policy when rendering decisions in a wide range of public law cases—the courts’ policy-making role in our three-cornered political system is not limited to...
instances in which they strike down legislative acts as unconstitutional. Studying interest group litigation thus merits our attention because courts do make policy, albeit through very different means, and if groups are influencing that policy it is important to understand which interests are represented in the judicial forum and how that representation occurs. With loosened standing requirements and increasing use of litigation by both private interests and the government, it becomes critical to understand this form of policy making.

THE UAW AS LABOR UNION AND GENDER DISCRIMINATION PLAINTIFF

When an interest group launches a comprehensive litigation campaign, spending seven years pursuing it all the way to the Supreme Court, it is logical to ask what prompted the action: how did the group come to adopt the issue in question onto its agenda, and why did it decide to use the courts? When a labor union is the organization bringing suit and the challenge involves sex discrimination in employment, these questions take on added significance, as gender issues have historically not figured prominently (if at all) on the agendas of organized labor or individual unions. Thus the case of UAW v. Johnson Controls provides a vehicle through which to explore not only the dynamics of interest group litigation but also a rather fundamental change in the labor force as women have come to play greater roles within both the work force and organized labor.

The review of the behavior of the UAW and that of the AFL-CIO and other unions in chapter 3 revealed that organized labor is not a monolithic entity. After observing the marked differences between the UAW and the AFL on gender issues on numerous occasions, and realizing that it is inaccurate to depict all unions as harboring discriminatory or “protective” attitudes toward women, it becomes less surprising that it was the UAW that brought suit over fetal protection policies. Although the UAW was not around in the late nineteenth and early twentieth centuries, when the battles around protective legislation began, even in the modern era it has been consistently ahead of the rest of organized labor on gender issues. Historically, the AFL opposed protective legislation for men, preferring that workers depend on the unions for protection, while favoring such laws for women for either competitive or paternalistic reasons, or both. Once the OSH Act and similar policies extended government protections to all workers, and gender discrimination had been outlawed for both employers and unions, organized labor had little choice but to drop its support for exclusionary laws and policies. The UAW, however, was much quicker to
move in this direction. The AFL did of course join forces with the UAW as the Johnson Controls litigation progressed, but it was the UAW that initiated the proceedings and brought the case to a point where a Supreme Court challenge was viable.

A frequent conception of public interest litigation is one of aggressive attorneys taking advantage of individual plaintiffs to pursue test cases, in effect using or even creating actual cases to afford the interest group the requisite standing to gain access to the judicial arena. But several of the attorneys interviewed for this study indicated that quite often that is not how cases such as this develop, and UAW v. Johnson Controls presents an example of a case whose genesis lay in the plaintiffs themselves. Certainly, these plaintiffs were linked to personnel and resources that facilitated taking their challenge as far as it went, but the workers themselves do not come across as unwitting pawns in someone else’s game: they may have been somewhat minor players by the time the case made the Supreme Court docket, but their very real grievances provided the initial impetus for the litigation.

By the late 1970s, when the issue of reproductive harm from workplace exposure first became a public issue, a confluence of both external and internal factors led to the adoption and litigation of the issue by the UAW and organized labor. Environmental factors included the existence of favorable legislation (Title VII and the PDA), the resurgence of the women’s movement and a political environment more favorable to reproductive choice, and the increasing availability of the courts as an additional forum through which to contest policy disputes. Among the internal factors were: the existence of aggrieved employees insistent on seeking redress; the emergence of women as a voice within organized labor; the adoption of health and safety in general as part of organized labor’s agenda; the presence of committed antidiscrimination attorneys within the UAW and the AFL; and the practical need of the union to respond to the needs of its fastest growing constituency—working women.

In pursuing its challenge to fetal protection policies through litigation, the UAW seemed to be emulating the policy pattern of the late 1960s and early 1970s over the implementation of gender discrimination legislation. Having found regulatory solutions unattainable, women’s rights and union activists in both eras turned to the courts for favorable interpretations of recently passed legislation. This raises important questions regarding whether litigation is an inevitable part of the policy process and the limitations of regulatory policy making. The tack taken by the UAW in its briefs to the Supreme Court when the case was granted certiorari further supports the view that the union was firmly resting its appeal on what
it saw as the intent of Title VII and especially the PDA. The union argued for a strict, narrow reading of the BFOQ exception, while its adversary, Johnson Controls, urged a more flexible approach to allow for accommodation of third party (fetal) safety interests.

There were interesting differences of opinion among the many attorneys who worked with or for the UAW on this case concerning how deliberate, focused, and coordinated the litigation effort was. Wasby’s (1984, 1995) research has to some extent disabused outside observers of the notion that the highly successful—indeed, paradigmatic—litigation campaigns of the NAACP LDF were tightly controlled and planned efforts. Quite often, Wasby discovered, the organization has had to be reactive rather than proactive, as many factors that influence a litigation campaign are beyond any one party’s control. Attorneys who worked within the UAW, such as Marley Weiss and Ralph Jones, depicted a much more calculated, controlled process, as did Joan Bertin of the ACLU, who herself had a master plan for just the sort of litigation outcome that did in fact occur. Others outside the UAW and the ACLU, but who were nonetheless closely involved, such as Susan Deller Ross and Judith Kurtz, and Marsha Berzon as well, spoke more of happenstance, saying that it was not necessarily the grand design of the UAW to change the law in this area—it just happened that a company adopted a policy that was highly objectionable to many of its women members and the union simply responded appropriately. The truth is undoubtedly some combination of these impressions, for Johnson Controls was neither the first nor the most visible employer to implement fetal protection policies. Other cases had been tried and resolved already when this one went forward, so the UAW was not acting randomly in a brand new area of workplace policy. The union knew what it was venturing into, but nonetheless may not have had a preexisting master plan in this policy area.

The UAW’s lawsuit drew in a host of outside parties who also saw important issues at stake for their own constituencies. Some were actively sought out by the litigating parties, while others came of their own accord, using the amicus curiae function as a vehicle for their own political expression. Among the friends of the court who supported the UAW position were many states and the federal government; these combined with the range of private interests that joined the plaintiffs’ side proved too formidable a group of adversaries to the company trying to defend its exclusionary policy.

While there was a large array of very diverse groups supporting the UAW, it is clear that it was labor and women’s rights attorneys who were the driving forces in this litigation. This case in fact symbolizes well the new era
in which these political and social movements truly joined forces as allies, not only on this issue but on the related issue of comparable worth as well. The cement holding that alliance together may very well be necessity, as both movements had their difficulties throughout the 1980s, but there are a number of areas of common interest, and this litigation has demonstrated the utility of closing ranks to overcome powerful business and conservative interests. The most consistent actors in policy struggles around pregnancy discrimination and fetal protection policies have been primarily labor unions and women’s rights legal groups, which have effectively transcended the rift that has at times existed between the labor movement and the predominantly middle-class feminist movement. Numerous participants in the *UAW v. Johnson Controls* case noted the existence and importance of this vital coalition. The Women’s Legal Defense Fund’s Donna Lenhoff recalled how “feminist lawyers at the UAW reached out to the women’s rights community,” and Susan Deller Ross recalled “labor unions working very closely with the women’s movement on the protection of women’s right to work and not be fired under these fetal protection policies.” Pat Shiu of the Employment Law Center had also stressed the value and importance of having organized labor as part of progressive coalitions.

The repeated activity of these two important sectors serves to illustrate one of the central assertions of this study—that organized interests with a clearly defined interest and investment in a particular issue will frequently follow that issue as it is taken up in various policy venues, including litigation. Cases that involve interpretation or application of the law cannot be viewed solely from the technical perspective of a discrete dispute between well-defined and identified parties. These parties and their case become vehicles through which organized interests can defend or advance a position that they might already have pursued in a legislative or regulatory forum.

**AMICUS ACTIVITY**

When a case has a relatively high profile, numerous organizations can latch on as amici, lending the appearance of a highly integrated lobbying campaign to the litigation. Again, the case is the vehicle through which these organizations can further a preexisting agenda. Like providing testimony for a congressional committee, or submitting comments on proposed agency rule making, groups can provide input to the court via amicus briefs. As was illustrated in the foregoing chapters, organizations will often engage in all of these means of articulating their positions.
Group Agendas

It became evident that it is quite possible for many different interests to see very different issues at stake in the same case. What appears upon initial examination to be a case concerning one manufacturer of automobile batteries and its employees of childbearing age became a large-scale contest over the balancing of women’s employment rights with fetal safety, as well as related issues such as legislative intent, the validity of animal studies in determining human vulnerability to toxins, tort liability, and the public health impact of reproductive hazards and lost employment opportunity. The amici for the UAW primarily emphasized equal employment opportunity and public health arguments, while those supporting the employer were defending the economic interests of business and the rights of the unborn (and unconceived) and arguing for different and competing readings of tort and occupational safety and health law. Some briefs invoked a range of issues, while others focused on one or two.

There were several groups that had participated in the past in contesting cases or policies dealing with gender discrimination in employment specifically around pregnancy and childbearing capacity. On the employer side, these stalwarts included the Chamber of Commerce and some of the conservative legal foundations, while on the plaintiff side, the ACLU, ERA, and the UAW itself have continually been central players. As described in chapter 2, the lines of cleavage around these employer policies formed in the early 1960s, as women’s roles in the workforce were undergoing dramatic changes. They began with the Equal Pay Act, when the ACLU and the AFL-CIO supported the legislation as the Chamber of Commerce worked against it. All three were major actors in the Johnson Controls case. The cleavages continued on through the passage of Title VII and the struggles over EEOC enforcement, and persisted through the litigation and legislation around pregnancy in the 1970s. The ACLU and AFL-CIO were again opposed by the chamber in cases such as Geduldig and Gilbert, key catalysts for the 1978 Pregnancy Discrimination Act, over which they also sparred. They faced each other again in the first Supreme Court case applying the Act, Newport News Shipbuilding, and in debate over passage of the Occupational Safety and Health Act and then the promulgation of OSHA’s lead standard. These same adversaries and others (the UAW and other unions, the Lead Industries Association, the EEAC) carried their missions through the attempted EEOC regulation of 1980 and the first fetal protection policy cases of the early 1980s, and finally on into this case.

The picture that emerges then is of well-organized interests squaring off against one another repeatedly over similar issues as those issues evolve
and emerge in diverse policy forums. Sometimes, the groups themselves are responsible for the emergence of an issue in a particular place and time, other times they react when an issue surfaces due to other circumstances. At times, in fact, groups will intervene in an amicus role to in effect “protect their turf”—to ensure that issues of importance to the group and on which it might have achieved some policy successes are addressed “properly.” This was illustrated in the present case, for example, by Trial Lawyers for Public Justice, which not only filed a brief to delineate its view of tort liability but also reviewed the briefs of other parties to ensure that they did not inadvertently undercut TLPJ’s position. The reality now is that if and when an issue moves to court, it is not unusual and the players in that arena are not different than those working the issue elsewhere. Going to court has become an almost routine part of the policy process, and contesting issues there is now a matter of course for many organized interests.

The Amicus Strategy

The groups that filed briefs amicus curiae in this litigation varied widely in their structures, purposes, and degree of involvement in litigation in general. On one end of the spectrum were groups that had been in existence for some time and continually monitored judicial activity for cases touching upon their interests, such as the National Chamber Litigation Center and the ACLU. On the other end were groups like the Industrial Hygiene Law Project, an “organization” that was formed solely for the purpose of filing a brief in this case that would not have the ability to litigate directly on its own.

The most significant amicus party in this case was the ACLU, in the person of Joan Bertin, who offered a straightforward explanation as to why her organization was involved in this case as amicus curiae and not as a litigant. The principal reasons, she stated, were that allowing the union to litigate the case conserved the scarce resources of the ACLU, as prior litigation on the same issue had proved costly, and that the lower court disposition had left the case with a sparse record, which she set out to remedy through amicus briefs, both her own and others. For Bertin and the ACLU, the outcome was a longstanding goal and considered critical. There were also other groups, such as the Natural Resources Defense Council and Concerned Women for America, for whom the specific outcome was of only secondary concern. They were interested in the legal status of animal research and fetal rights respectively, and saw either a threat or an opportunity in this case to advance their agendas in these more narrow areas. Filing an amicus brief thus allows a group to focus only on a specific issue without incurring the costs of a litigation effort, for which it may also lack the requisite standing.
It is not possible to determine with certainty whether the efforts of the UAW’s amici played a part in its victory (see below for a discussion of the Supreme Court decision), but the joining together of such a multitude of professional, political, and social interests, as well as several government entities, seems likely to have affected the Justices’ perception of the case and the issues. This is of course precisely what litigating lawyers and their amici hope, as many of them have notions about how the Court operates and how their own tactics affect that operation. Challenging fetal protection policies in court had never proved successful before, and so the UAW expanded the scope of conflict: first through class action certification and even more so through the retention of a wide array of supporting groups. This is an interestingly paradoxical strategy, at least on a theoretical level, as the judiciary renders interpretations of either the Constitution or existing law—it does not promulgate new law. Groups appealing for judicial resolution of a conflict must frame their appeal in terms of extant policy, rather than ask for a new balancing of interests and the creation of a new law. For a policy change, groups must seek legislative relief, grounding their claims in popular support and appealing to majority rule. By retaining a large and diverse spectrum of interests to back a claim in court, a litigant is essentially introducing an element of popular will into what is designed to be a process dictated only by existing rules and their effects on the parties to the case at hand. It would be difficult to find a more telling illustration of the politicization of the judicial process, as these groups essentially lobbied the Court for a particular interpretation of the bona fide occupational qualification (BFOQ) exception under the Pregnancy Discrimination Act.

Judith Kurtz, Managing Attorney for Equal Rights Advocates, and Pat Shiu of the Employment Law Center, observed that when an organization is participating directly in litigation and representing a plaintiff, that plaintiff’s interests are always paramount and cannot be compromised in order to make a political statement. As a result, while groups may have more control over the progress of a litigation effort as a direct party, in some sense they are more constrained when there is an actual plaintiff with discrete interests involved. Kurtz said that as an amicus organization, there is greater freedom to “urge political points that you want to push.” So, while much of the interest group litigation literature has cited a preference by groups to participate in litigation as a party rather than as amicus in order to retain control, this preference may not be universal, and is in fact strongly affected by a group’s purpose in a particular case or issue area. If a political statement is more important than the actual case outcome, participating as amicus is in fact more advantageous, as a group then has freedom to state its views without the constraint of plaintiffs’ interests.
An interesting phenomenon to observe when studying interest group litigation is how groups spar with one another in the judicial arena. The litigation process is far more constrained than other political forums, and as a result the interplay between interests is also more muted. Moves in this process are carefully controlled by the Court itself, with firm deadlines by which briefs must be filed and page limits on those briefs, which represent the only form of participation and communication, even by the involved parties. The parties in the litigation continually file briefs and then more briefs in response in a back-and-forth process, taking on and countering the arguments made by their opponents. They thus engage in a sort of legal dialogue with each other through their briefs to the Court. Amici, however, are limited to one filing and, depending on which party the brief supports, have a certain deadline by which the briefs must be filed. This process lends a tactical advantage to the amici for the respondent, as they are able to address points made by the petitioners’ amici in their briefs, as they have already been filed. The “dialogue” thus becomes more of a limited debate, with one side making arguments to which the other side is free to respond, while the first side lacking an opportunity for rebuttal.

The amici supporting Johnson Controls took ample advantage of the opportunity to counter assertions by the UAW’s supporters. All but one brief referenced at least one of the briefs filed for the UAW, with some mentioning two or three. The brief most commonly cited in this way was the U.S./EEOC brief, which is not surprising given its status as the controlling regulatory agency and its partial support for some types of exclusionary policies in some circumstances. Although the EEOC is not widely viewed as a particularly formidable regulatory authority, both sides in this case cited the EEOC whenever possible in order to enhance the credibility of their arguments.

There emerged in the amicus process in this case a set of adversarial counterparts on each side, organizations or groups of organizations that focused on a particular aspect of the case but with opposing interpretations. And so, while the UAW and Johnson Controls sparred over that company’s policy, other rivals took up various related issues. The brief of Equal Rights Advocates in a sense “debated” the correct interpretation of the legislative history of the PDA with the Chamber of Commerce’s brief; legal staff involved in the ERA brief had been involved in drafting the PDA, and the Chamber had testified against it. Trial Lawyers for Public Justice, an organization committed to using mechanisms like tort liability to advance socially progressive causes like environmental protection, occupational health, and employee rights, was challenged in its opinion regarding the potential tort liability of employers like Johnson Controls by
the Washington Legal Foundation, a politically conservative organization committed to business interests. The American Public Health Association’s opinion on risk assessment was met with opposition by the Industrial Hygiene Law Project. These sparring groups were taking on the same issues but approaching them from different perspectives, representing very different constituencies—this was a battle of the experts on several quite important policy areas taking place around a case ostensibly involving but one company and one union. Just as a congressional hearing on proposed legislation assembles panels of witnesses to represent various interests, here the interests assemble themselves, as there is no formalized process within the judiciary for ensuring that all potentially affected parties are heard, beyond allowing the filing of amicus curiae briefs.

**Amicus Coordination**

“Don’t annoy the Justices!” This was a familiar mantra among the Supreme Court attorneys queried about their involvement in this and other policy-oriented litigation. The tactics employed and the disparity in the level of formality between legislature and judiciary give this admonition heightened importance in the latter arena. In Congress it might prove productive to have as many constituents and groups as possible contact legislators to influence a vote, since more communication is taken as indicating more interest, but such tactics are actively discouraged when dealing with the Court. Many amicus attorneys with Supreme Court experience spoke of “me-too briefs” that are explicitly frowned upon by the Court. While the Court is interested in knowing who, beyond the litigants, is affected by the issue in question, it does not want a brief from each group with something at stake that has no additional information to offer.

While many attorneys allowed that there was some value to letting the Court know just how many groups felt themselves to be affected by a given case, Jordan Lorence echoed many in stating that the Court does not appreciate amicus briefs that merely reiterate the arguments of the litigants. Such briefs, he stated, which simply inform the Court that a group supports a certain position, are of minimal value to the Justices. Rather, they prefer briefs that explain other implications beyond the instant case, or that provide additional factual background. In his words, “this is how you lobby the Supreme Court, this is the official way to do it; you don’t write them letters like you do Congress, you file an amicus brief.”

Several attorneys referred to this imperative as encouraging more coalition activity between groups filing briefs. Bertin’s theory was that it is better to give the Court fewer but better briefs. In addition to decreasing the
load on the Justices, there were other advantages cited for coordinating amicus activity. By parceling out various points or arguments to outside groups, parties to a case can conserve precious space within their own briefs, focusing on the facts or issues most vital to them, while ensuring that other points will still be presented to the Court. Having outside groups file amicus briefs thus serves to afford litigants additional pages through which to advance their causes, as well as to alert the Court to the extent of interest in the issue being litigated. Using amici also allows the parties to have certain arguments presented by entities with greater credibility or expertise. It in fact became evident through the foregoing analysis that often the composition of parties on a brief, or even those cited within its pages, can be an important part of the message.

The two sets of amici in UAW v. Johnson Controls were decidedly different from one another in terms of amicus coordination. Stanley Jaspan, the attorney representing the respondent company, professed that he played no deliberate part in coordinating amicus support, while Berzon and Bertin spent considerable effort lining up dozens of organizations friendly to the UAW’s cause. This case was somewhat remarkable in terms of the large number of amici that participated, but the numbers alone may be misleading, particularly with regard to those on the UAW side. While some of the amicus groups certainly had real interests at stake and were involved in the drafting of their briefs, many of these groups were asked to participate by the union or were asked to sign on to a brief in progress. The ACLU brief alone contained forty-nine organizational co-signatories, representing 53 percent of the total organizations on this side of the case. The APHA’s contained ten groups, which constituted 11 percent of the total. The remaining eight briefs carried the balance of organized interests for the UAW. Thus the two briefs that were directed by Joan Bertin accounted for 64 percent of the groups, most of whom simply signed on. So, although they endorsed the position being taken by the UAW and its lead amici, many of these groups did not step forward of their own accord out of an internally driven sense of need but were in fact recruited to lend greater diversity or weight to the effort, or to provide additional credibility.3

THE FINAL DECISION

On March 20, 1991, seven years after the first EEOC charges were filed against Johnson Controls by the UAW in Wisconsin and following two adverse decisions in the district and appellate courts, the U.S. Supreme Court validated the union’s claim that fetal protection policies were in direct violation of the legal proscription against sex-based employment
classifications contained in Title VII as amended by the Pregnancy Discrimination Act. While it is not possible to discern with certainty which arguments made by the parties or their amici influenced this outcome, inferences can be made from the framing of the Court’s decision.

After reviewing the adoption of fetal protection policies by Johnson Controls and the subsequent litigation that they inspired, the Court states in its opinion that it granted certiorari in order to “resolve the obvious conflict between the Fourth, Seventh, and Eleventh Circuits on this issue, and to address the important and difficult question whether an employer, seeking to protect potential fetuses, may discriminate against women just because of their ability to become pregnant” (196). In its petition for certiorari, the UAW had indeed stated that the three lower courts had “left the law in total disarray.” Resolution of lower court conflict was also one of the two broad reasons given by the ACLU in its amicus brief supporting certiorari. On the other hand, the brief for Johnson Controls opposing certiorari asserted that “unanimous federal precedent holds that Title VII permits an employer in narrow circumstances to adopt a fetal protection policy.” The conflict in the lower courts actually concerned the burden of proof scheme to be applied to these policies and not the outcomes of these cases, which were indeed consistent with one another. In its brief opposing certiorari Johnson Controls attempted to minimize the importance of these inconsistencies, arguing that they were “immaterial” to the outcomes, which the UAW directly disputed in its subsequent reply brief to the Court.

Before explicating its decision, the Court acknowledges in a footnote the recently decided cases of Grant v. General Motors and Johnson Controls v. California Fair Employment and Housing Commission, both of which for the first time invalidated fetal protection policies.

There were four primary components to the Court’s opinion, which was written by Justice Harry Blackmun and joined by Justices Thurgood Marshall, John Paul Stevens, Sandra Day O’Connor, and David Souter. While it did not cite directly any of the briefs of either the parties or amici, many of their arguments are evident in the decision.

First, the Court stated that the fetal protection policy in question constituted facial discrimination, or a case of disparate treatment, holding that because the policy classifies on the basis of the potential for pregnancy it constitutes “explicit sex discrimination under the PDA,” a point made by the ACLU in its amicus brief on the merits. The lower courts were criticized by the high court for applying the disparate impact/business necessity framework and the Wards Cove burden of proof scheme (which several of the amici supporting Johnson Controls explicitly endorsed). The Court further stated that the policy was not neutral because it did not apply to
males, and that a benevolent motive such as protection of potential offspring “does not cancel out discrimination.” Both of these arguments were made explicitly by the UAW in a brief, and the nondiscriminatory motive point was also made by the ACLU. This conclusion, noted the Court, is bolstered by the PDA and by the new EEOC enforcement policy promulgated in response to the Seventh Circuit decision in this case. Because the employer’s policy constitutes disparate treatment, the Court determined, the BFOQ standard must apply.

Second, the Court stated that Title VII’s BFOQ provision, the PDA, legislative history, and case law all prohibit employer discrimination based on the capacity to become pregnant. The BFOQ safety exception, the Court declared, is limited to interference with ability to perform the job in question (this was also argued by the UAW, as well as by the ACLU, ERA, the state of Massachusetts, and the APHA), and unconceived fetuses are neither customers nor third parties whose safety is essential to business. The PDA’s own BFOQ standard is invoked, which states that pregnant employees must be treated the same unless they differ in their ability to work. Here the Court cites the House and Senate legislative reports on the PDA, indicating that the emphasis on the PDA’s legislative history by ERA and the Women’s Legal Defense Fund through the brief by Susan Deller Ross may have had an impact. The Court concurred with their depiction of the intent of the PDA, and not with the interpretations offered by the Chamber of Commerce and others who offered competing versions of the PDA’s meaning.

Third, the decision held that the respondent company could not establish a BFOQ, as “professed moral and ethical concerns about the welfare of the next generation do not suffice to establish a BFOQ of female sterility” (206). Here the language used by the Court is similar to that employed in the amicus brief of Trial Lawyers for Public Justice, which stated that “expanding the BFOQ defense to include considerations of moral concerns and social costs . . . will eviscerate Title VII.” The decision further held that Title VII and the PDA mandate that decisions about the welfare of children be left to parents and not to employers or courts, disallowing employment decisions based on reproductive capacity. Since only a small minority of women might even become pregnant, a fear of prenatal injury does not show that substantially all fertile women are incapable of doing their jobs. Here the language and arguments are similar to those employed by Trial Lawyers for Public Justice, whose brief claimed that “Johnson Controls’ policy is based on a web of speculation about the number of women who might get pregnant and who might have children adversely affected by lead.”
Finally, the majority opinion added that employers’ tort liability and increased costs “do not require a different result.” For if Title VII prohibits fetal protection policies (as this Court has determined) and the employer informs employees of existing risks and does not act negligently, the basis for tort liability “seems remote.” In its final brief to the Court, the UAW had argued that “a non-negligent employer would not be tort liable.” In any event, the opinion continued, the incremental cost of hiring members of one sex cannot justify discrimination. Marsha Berzon stated in her oral arguments that a monetary factor like tort concern cannot establish a BFOQ. The Court notes that OSHA has stated since 1978 that there is no basis for female exclusion. The opinion further holds that Title VII forbids discrimination as a means for diverting attention from the employer’s obligation to monitor the workplace for hazards.

The majority opinion concludes by minimizing its own decision, stating that the holding is “neither remarkable nor unprecedented,” since “we do no more than hold that the PDA means what it says.” Observing that concern for offspring has been a historical excuse for denying women equal employment opportunity (which was noted by the APHA, Trial Lawyers for Public Justice, and the New York City Bar in their briefs), the opinion states that it is not for either the courts or employers to make choices regarding employment and reproduction for women.

Justices Byron White, William Rehnquist, and Anthony Kennedy authored a separate concurring opinion. In their opinion, these Justices agreed with the majority in finding that the policy at issue here was facially discriminatory and overly broad, that summary judgment below was improper, and that the burden of proof had been misapplied below. But the concurrence claimed that the Court erred in determining that fetal protection policies could never pass muster under the BFOQ defense, thus agreeing with the view adopted by the United States and the EEOC in their amicus brief (although the brief is not cited directly). They also specifically disagreed with the majority that tort liability could not be part of the equation, and held that compliance with Title VII and OSHA would not necessarily protect an employer from such liability.

Justice Antonin Scalia wrote his own separate concurring opinion, in which he stated that the discussion of evidence of harm to males was irrelevant, because even without such evidence, treating women differently on the basis of pregnancy constitutes discrimination. He also held that whether or not all pregnant women place children at risk is also irrelevant, as Title VII leaves that decision to parents. He disagreed slightly with the other concurrence by agreeing with the majority holding that any action required by Title VII could not give rise to tort liability—this does not
answer the question, however, of whether an action indeed is required by Title VII even if it renders one subject to liability under state tort law. Scalia also asserted that cost considerations could be relevant to a BFOQ defense.

Whether the Court was swayed by some of the more political or social arguments against fetal protection policies is difficult to tell, as it predictably confined its decision primarily to legal arguments related to the proper application of statutory law (with the exception of the acknowledgment that childbearing has been a traditional rationale for gender discrimination). The UAW and each amicus brief in its support all made the straightforward claim that fetal protection policies violated Title VII and the PDA, and this is what the Court held in its decision. It is therefore not possible to determine if any brief managed to convince the Court that this was the appropriate reading of the law. Many of the points that distinguished individual amicus briefs from one another were not invoked in the decision, such as the broad public health impact (the state of Massachusetts), or the disproportionate impact on people of color (NAACP LDF), or the validity of animal studies in determining human risk (NRDC). Nonetheless, the amici whose roles emerged as dominant in chapter 4—the ACLU, the APHA, and Equal Rights Advocates—are the ones whose arguments appear most prominently in this decision. Since these groups’ involvement with the issues at stake predates this decision—in fact reaching back to the emergence of fetal protection policies as a policy issue—this is not terribly surprising. Whether it was the organizations’ and attorneys’ stature or the merits of their arguments that swayed the justices cannot be determined with certainty, but in fact the line dividing the two may be somewhat artificial, as it has been largely their work in these areas, developing the legal arguments and a track record, that had earned these groups their credentials.

Overall, the tone and content of the opinion comported most closely with the positions of the UAW and its closest amici—the ACLU and the PDA legislative history coalition brief—while the White/Rehnquist/Kennedy concurrence matched up more closely with the position adopted by the Bush administration’s solicitor general and EEOC.

LITIGATION AS PART OF THE POLICY PROCESS

As interest group litigation lies squarely at the nexus of law and politics, a typical pattern that emerges when studying interest groups that engage in litigation is a sort of symbiotic relationship between legal expertise and the political will of an organized interest. A group filing a brief brings with it the presence of the constituency that it purports to represent, while attorneys
provide the technical expertise and language that allows the group to engage in the highly formalized process of litigation. Both sides of the partnership are necessary, as neither seems to be sufficient alone. Indeed, the counsel of record on a Supreme Court brief must be a member of that bar, which precludes just anyone from filing a brief. But simply being a Supreme Court attorney is not enough either. The Court has truly become a forum for group politics, and attorneys recognize the need to present themselves as representatives of larger interests. Even groups with their own internal legal staff may go outside the organization if a particular view or expertise is needed—the matching up of Susan Deller Ross, a legal expert on the PDA, with Equal Rights Advocates and the Women’s Legal Defense Fund, provides a clear example of this strategy. Groups without established legal mechanisms must rely solely on outside counsel—examples include the partnering of Margaret Phillips, the industrial hygienist, with Ilise Feitshans on the Industrial Hygiene Law Project, and Joseph Kinney of the National Safe Workplace Institute working with attorney James Holzhauer.

Some of the attorneys for organizations that are active participants in the litigation arena explicitly stated that the judiciary actually was not an appropriate forum for the resolution of many issues that are nonetheless disputed and decided there. Several of the amicus briefs in *Johnson Controls* asserted within their pages that the issues at stake in the case were better left to Congress or regulatory experts than to the courts for resolution. They cited the lack of expertise of judges to resolve issues of this complexity, and the fact that the balancing of interests required by conflicts such as this is the job of a legislative body, particularly when the law governing the particular issue, such as fetal protection policies, is unclear.

The brief filed by the Industrial Hygiene Law Project made this point strongly. The brief stated that Title VII litigation was quite ill suited to resolve such technical issues, arguing that occupational health policy was the purview of OSHA, and that any lapses in OSHA’s policy making should be addressed by Congress and not the courts. This was especially pertinent in the extant case, the IHLP stated, as Congress had at that time expressed an intention to address reproductive health hazards. Even the ACLU brief, with its impressive array of organizations, stated that the courts in this area were performing a legislative function by balancing interests. But rather than stating that the issue needed to be taken up by Congress, the ACLU brief asserted that this matter had already been addressed and settled by the PDA, which in the ACLU’s view was plainly intended to prohibit policies such as that of Johnson Controls. Despite these admonitions, these organizations nonetheless recognize that for good or bad, the Court will often be the final arbiter of a policy dispute. They therefore feel compelled to
articulate their interests in the outcome, just as they would if there were pending legislation.

Margaret Phillips of IHLP, while criticizing judicial resolution of occupational and public health issues, was nonetheless rather positive in her evaluation of the litigation process itself. She noted that filing an amicus brief was remarkably affordable, especially as compared with how expensive other types of political action can be, and was thus within the reach of even small groups. She also viewed the process as more focused, providing a single point of contact, whereas the legislative process can be quite diffuse. The formality and narrowly defined methods required of groups addressing the Court actually serve to reduce groups’ costs, in her opinion. Her partner on the IHLP’s brief, attorney Ilise Feitshans, had a similarly enthusiastic if mixed view of the process. She saw tremendous value in the ability of groups that might not otherwise have a voice in the political process being able to participate in this way, characterizing it as the “essence of truly grassroots, single-issue politics.” It can though, in her view, at times mask sham organizations that are mere fronts for groups trying to conceal their true agendas, or trying to add extra weight to an interest already being expressed. Nevertheless, Feitshans views the process as truly important, even the “essence of democracy,” for although such freedom of access might clog the process, it is worth it if it affords individual voices a forum through which to be heard.

Is pursuing policy through the judiciary truly unique, in more than a procedural way? Joan Bertin asserted that lobbying in the various venues (legislative, regulatory, judicial) was not as different as one might think. This is due, in her opinion, to the fact that all forums have become adversarial and that they simply represent different mechanisms through which to work out controversy. Lawyers and lobbyists, she says, do essentially the same thing, which is build a case—the style of advocacy is simply more formalized in the judicial setting. So, in a sense, she was confirming the thesis here—advocates will seek change in all venues, and their adversaries will meet them there.

But the formality of litigation is such that it can truly serve to constrain debate on issues in two primary ways. First, the nature of litigation and its procedural rules can limit who participates. Procedural rules can preclude certain issues from being raised (for example, issues waived below often cannot be revisited on appeal), circumstances particular to the parties at interest can even render an entire case moot, and, technically, amici must get permission even to file. A group must have standing or wait for someone else with standing to engage in litigation and file an amicus brief to get involved at all, assuming that it is aware of the pending case in the first place.
As was shown in this case, the majority of the amici on the side of the UAW were invited to join the case, while others did so because they were well-established organizations with the resources to monitor pending litigation for issues pertinent to their agendas. The process itself does not necessarily facilitate widespread participation by all interests who might be affected by the outcome, and thus not all relevant information will necessarily be presented to the court. By contrast, significant regulatory proposals are typically published in the Federal Register and public comment is solicited. While the legislative process is not entirely transparent, Congress is structured in such a way so that if an issue has salience for a particular interest, some legislator at some point in the process is likely to consult at least a lobbyist for that interest, and sometimes even his or her own constituents.

But the courts are not supposed to balance all competing interests in a policy issue, only those of the parties in the case before them, which may not represent all who are affected. The American judiciary was not intended to be a political forum, certainly not the “essence of democracy.” Federal courts do not render advisory opinions, operating under a mandate to rule only on actual cases or controversies between parties with direct real interests. Modern public interest litigation, however, has grown far from this model. The UAW itself turned this into a major battle on behalf of all workers similarly situated by pursuing it as a class action and persisting through the U.S. Supreme Court, and the legions of amici further rendered the case a large-scale group conflict.

The second way in which moving an issue into court serves to constrain the policy process is in the very nature of litigation. Parties cannot go to court seeking new legislation or implementing regulations—this kind of primary policy making is the purview of the legislative and executive branches. Once a group is in court, it must by definition cast its claims in terms of already-existing law. This imperative serves to render the process of seeking “policy” from a court more conservative—or, to put it another way, it has a moderating influence upon the interests before the court. Organizations cannot go to court simply because they do not like the current state of the law. They must present a cognizable claim, one recognized in either the common law or via a constitutional or statutory grant. One might argue that a congressional statute is unconstitutional, or that a regulatory body exceeded its statutory authority, but not simply that the law is disagreeable to one’s interests.

This was borne out by comparing the stated agendas of many of the organizations involved in the Johnson Controls litigation with the arguments that they presented in their briefs. Thus, while the Chamber of Commerce might well want to see all regulations that constrain private
businesses disappear, it could not claim that when helping Johnson Controls defend itself in a Title VII claim such as this. The UAW might have preferred a law explicitly banning fetal protection policies, but instead argued that existing law already proscribed them. The ACLU Women’s Rights Project might have preferred to argue that the OSHA lead standard—indeed, all workplace regulations—should use the pregnant woman as the standard rather than the average male worker typically envisioned by such regulations. (This was in fact the philosophical position of some of its allies, such as the Women’s Legal Defense Fund.)

All of this bears upon the question of genuine interest representation. When cases with the potential to affect public policy are tried in court, there are several layers of interests present: the parties to the case (that is, the distinct plaintiff and respondent), their attorneys, organizations with which those parties or attorneys may be affiliated, and potentially a host of amici, also with attorneys, staff, and members, many of whom may be unaware that their interests are being implicated in a specific case. It seems safe to conclude in this study that the interests of the original plaintiffs provided the impetus for the litigation and were faithfully represented. But unions are unique among organized interests, as they legally represent their members under collective bargaining agreements that bear directly on those members’ livelihoods. The same cannot be said for the members of voluntary public interest groups. As Scheppele and Walker (1991) observed, unions have strong reasons to use the courts, and they do use them extensively. But their representational link to their constituents is far stronger than most other groups that engage in similar litigation. The degree of congruence of interest between organizations, attorneys, and mass constituencies thus remains a viable field of exploration, as it may be difficult to extrapolate the findings herein beyond the organized labor context.

Also, cases of unusually high salience such as UAW v. Johnson Controls may not provide the best vehicles for discerning general patterns about group litigation, as they may elicit ad hoc participation by groups that do not usually engage in this process. The number of briefs and groups is higher than average, compromising the ability to generalize. What a study like this does reveal, however, are the various dynamics at play in a litigation campaign. In order to further explore how interest representation and policy formation differ between political institutions, it may be fruitful to compare how policy arguments are presented in legal briefs to how they are made in other forums like the legislature. Language is essential in politics, and it would be illuminating to compare how organized interests convey their philosophies and goals to their membership (or potential members), to legislators, and to jurists.
The events in this litigation and the observations about the group litigation process made by many of the attorneys interviewed confirm many of the findings of earlier scholars: groups do indeed look to the courts for sympathetic policy outcomes; they do so for various reasons, not all related directly to the outcome; they do it either directly or via amicus briefs; and more and more of them are learning how to do it. Beyond this, the foregoing account has provided a detailed look at one significant campaign, to demonstrate the intricate dynamics involved in a complex litigation effort, dynamics that emanate from the plaintiffs outward to dozens or even hundreds of other interested parties. At the same time, some new insights emerged into the interconnectedness of the feminist and labor movements in their struggle to combat age-old views of women’s roles in the family and the workforce.